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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 528

JOINT COUNCIL DINING CAR EMPLOYEES, LOCALS 456 and 582, for and in behalf of BERTRAM HICKS, waiter, and other employees similarly situated,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

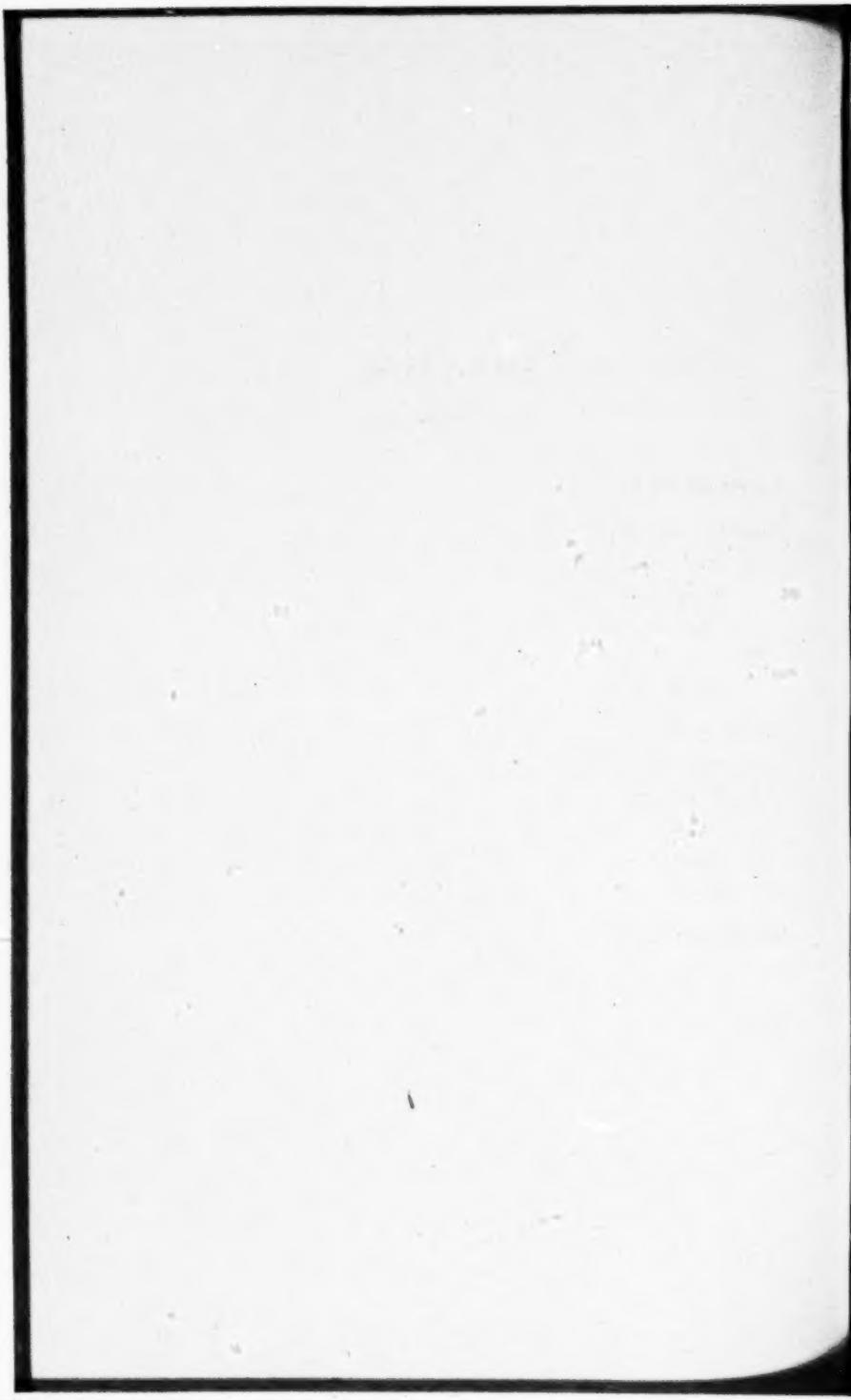
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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Petitioner,

vs.

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Respondent.

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STATEMENT OF THE CASE

Respondent, in connection with its passenger train service, operates a considerable fleet of dining cars. The waiters on these cars are a part of the craft of respondent's employees known as "dining-car employees."

Effective July 1, 1922, respondent promulgated to its dining-car employees, including waiters, a schedule of rules governing hours of service and working conditions, but

not compensation (R. 139-143). About October 1, 1937, there became effective an agreement with the dining-car employees setting forth a schedule of their rates of pay (R. 144-146).

These schedules do not mention the practice of furnishing meals to these waiters while on duty. There never has been any written agreement relating to that practice. However, it has been and still is the custom for respondent to furnish meals in dining cars to waiters when on duty and performing service (R. 39-40). No separate charge or deduction ever has been assesed or collected on account of such meals; but they always have been customarily furnished, as an incident of and inducement to the employment, and an additional consideration for the services rendered (R. 39-42, 46, 56-57, 253).

Bertram Hicks, the employee mentioned in the title of this action, has been, since prior to March 1, 1941, and now is, a dining-car waiter employed by respondent.

On March 1, 1941, there became effective a Railroad Wage Order, promulgated by the Wage and Hour Administrator, which required that every employee of a trunk-line railroad be paid a "wage" of at least 36 cents for every hour employed (R. 162-165). That order defined the term "wage" in the following language, corresponding to Section 3, paragraph (m), of the Fair Labor Standards Act (29 U.S.C.A., Sec. 203(m)):

> "'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees. The term 'reasonable

> **cost' is to be not more than the actual cost to the employer of the board, lodging, or other facilities. Reasonable cost does not include a profit to the employer or to any affiliated person."**

Effective August 31, 1942, the Administrator promulgated a second Railroad Wage Order, which increased the minimum hourly "wage" of railroad employees to 40 cents (R. 165-168). This order defined the term "wage" in the same language quoted above.

When the first order became effective (March 1, 1941), the hourly rates of money compensation payable under the applicable agreed schedule to certain of respondent's waiters were less than 36 cents. For Bertram Hicks this rate was 32.5 cents (R. 43-44). There were also, on August 31, 1942, the effective date of the second order, certain agreed hourly rates of money compensation for waiters less than the 40 cents named in that order.

An agreed general increase in rates of pay became effective September 1, 1941 (R. 47-48, 147-153), which brought the hourly rates for all waiters above 36 cents. A similar general increase, effective February 1, 1943, brought their agreed hourly rates above 40 cents (R. 48, 153-159). Thus, the only periods when it was necessary to add the cost of meals to the money actually paid, in order to meet the wage order minima, were March 1-August 31, 1941, and August 31-January 31, 1943.

Both prior and subsequent to March 1, 1941, respondent in each calendar month calculated its reasonable actual cost of the meals furnished to and consumed by each waiter. The record of the meals so consumed is shown on meal checks bearing the several waiters' individual

signatures (R. 58-59). Throughout each of the two periods mentioned, the cash compensation paid each waiter, added to the reasonable actual cost of the meals furnished to and consumed by him, equalled or exceeded the minimum "wage" prescribed in the current Wage Order (R. 62).

The employee representatives objected to respondent's having included the meal costs in and as a part of the over-all "wages" payable under the Wage Orders (R. 63-64). The matter was handled under the Railway Labor Act as a "grievance" dispute between respondent and Bertram Hicks. When this handling failed to bring about a settlement, petitioner, on December 16, 1943, filed with the Third Division, National Railroad Adjustment Board, a notice of intention to present to that Board a claim against respondent (R. 77-78).

The claim having been docketed, petitioner and respondent filed with the Third Division their several submissions, replies, rebuttal statements, and written arguments (R. 79-258). The permanent members of the Third Division deadlocked on the claim and a neutral referee was appointed to resolve the deadlock.

Two issues were presented for decision by the Third Division:

1. Was respondent under a contractual obligation to furnish meals to its dining-car waiters?

2. Could respondent take into account and include its reasonable cost of such meals, in determining whether the minimum "wage" required by the Wage Orders was being paid?

On October 23, 1944, the Third Division rendered its Opinion, Findings, Award, and Order (R. 21-25). In its

Opinion the Division answered the first of the above questions in the affirmative. Ever since respondent has accepted that result. The Division expressly refused to answer the second of the above questions,* stating (R. 24):

> "The *wages* to which the claimant is entitled *is a matter of law,* rather than of contract. Section 16 of the act (Fair Labor Standards Act, 29 U.S.C.A. Sec. 216) contains appropriate provisions for its enforcement, but this is not the responsibility of this Board. To say more would merely becloud the issue." (Emphasis added.)

In its Findings (R. 24) the Division held that respondent had violated its agreement (to furnish meals) and in its Award (R. 24) sustained the claim, "to the extent indicated in the Opinion and Findings." Its order of October 23, 1944 (R. 25), directed respondent to make the award effective and to pay the money payments required thereby by January 1, 1945.

Following respondent's refusal to comply with the order, the present action was commenced in the District Court. The action was tried by the court without a jury. Petitioner's evidence was wholly documentary, consisting of the record before the Third Division (R. 38-39, 77-258), the interrogatories addressed by it to respondent and the answers thereto (R. 39-48), and all payrolls of respondent ("constructively" placed in evidence) (R. 49-50). Respondent produced both oral and written testimony (R. 50-65, 259).

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*However, in Award No. 2699 (copy attached as Appendix A), rendered 28 days later, the same Division made findings adverse to petitioner's contentions on the precise questions which it had expressly refrained from deciding in this case.

By Memorandum Decision and Opinion, dated September 13, 1946 (R. 260-264), the District Court held that the award and order in suit should be enforced, basing its decision on the factual ground that the meals furnished were a "working condition" supplied for the benefit and convenience of respondent, and the legal ground that such meals were not "board," within the meaning of Section 3(m) of the Fair Labor Standards Act (29 U.S.C.A. Sec. 203(m)). The District Court entered its Findings (R. 264-266), Conclusions (R. 267), and Judgment (R. 268-269) on November 30, 1946.

Appeal was duly taken by respondent to the Circuit Court of Appeals, Ninth Circuit, which on December 9, 1947, entered its Opinion (R. 284-302) and Judgment (R. 302-303) reversing the District Court. The Circuit Court based its decision on three grounds:

1. The Third Division made no finding on the question whether the cost of the meals furnished could be included in determining whether the prescribed minimum "wage" had been paid; so that no question existed concerning the prima facie value of a finding of the Division on this point under Section 3, First (p) of the Railway Labor Act (45 U.S.C.A. Sec. 153, First (p)).

2. The furnishing of meals by respondent to its waiters is not a "working condition"; but even if it were, it is part of the "price" or "wage" they receive for their services, and as such falls within the definition of "wage" in the Fair Labor Standards Act and the Wage Orders issued thereunder, unless within some exception provided in the Regulations of the Administrator.

3. Petitioner had not sustained its burden of showing that the meals were furnished primarily for the benefit and convenience of respondent, and thus were within such exception.

SUMMARY OF ARGUMENT

I.

The Reasons Assigned by Petitioner for Granting Certiorari (Brief, Pages 19-22) Assume a Situation Which Does Not Exist on the Record of This Case.

Each of the reasons assigned by petitioner for granting certiorari is based on the same general ground, i.e., that the Circuit Court failed to give controlling weight to the findings and order of a Division of the National Railroad Adjustment Board. This claim assumes for this case a fact which does not exist; for the Division made no finding on the principal issue, i.e., whether the meal cost was includible in "wages"; but on the contrary, expressly refrained from so doing (R. 23, 24). There being no finding by the Division on the question decided by the Circuit Court, there is nothing to which to apply the statutory *prima facie* evidence rule; for the statute provides only that the "findings and order * * * shall be prima facie evidence *of the facts therein stated.*" (Emphasis supplied.)

There is no conflict between the decision of the Circuit Court and those cited by petitioner (Brief, pp. 19-20). In each of those cases the administrative board or commission had made findings *of fact* which supported the order, and the only question involved was whether the

evidence before the board or commission supported the findings. Each case involved a statute which provided, as does Section 3, First (p), of the Railway Labor Act, that the findings and order of the board or commission should be *prima facie* evidence "of the *facts therein stated.*" Where a fact is *stated,* that statement is given *prima facie* evidentiary weight (if supported by substantial evidence); but if no fact is stated, there is nothing to which the presumption may attach under the statute. Such is the situation in the present case.

II.

The Circuit Court Did Not Exceed the Permissible Scope of the Appellate Inquiry.

The Circuit Court, in holding that the District Court erred in finding that the furnishing of meals to the dining-car waiters was a working condition, and also in finding that such meals were furnished primarily for the benefit and convenience of respondent, did not exceed the permissible scope of the appellate inquiry.

In a non-jury case where the evidence is primarily documentary, as in the case at bar, there is no reason for applying the principle that an appellate court will not set aside the findings of the trial court if there is evidence to support them. The trial court is in no better position to judge of the credibility of the witnesses and the weight to be given to the evidence than is the appellate court. *Aetna Life Ins. Co. v. Kepler* (C.C.A. 8), 116 F. 2d 1, 4; *Carr v. Southern Pacific Company* (C.C.A. 9), 128 F. 2d 764, 768; *Western Union Tel. Co. v. Bromberg* (C.C.A. 9), 143 F. 2d 288, 290; *Smith v. Royal Ins. Co.* (C.C.A. 9), 125 F. 2d 222, 224 (cert. denied 316 U.S. 695).

The controlling question is whether the meals supplied by respondent are part of the over-all "compensation" of the employees receiving them. On this question the District Court made no finding; its only finding was that the furnishing of such meals was a working condition (R. 264, 265). This finding the Circuit Court held to be erroneous (R. 289), but went on to state (R. 289):

> "If it were (a working condition), it nevertheless is a part of the wage or price."

Thus, while under the permissible scope of the appellate inquiry the Circuit Court was entitled to determine that the District Court's finding was erroneous, the court further held that such finding was immaterial, and considered that the result would be the same even if the finding were allowed to stand.

The meals furnished to the waiters being part of the price* for their services, i.e., "compensation," respondent was entitled to take their cost into account in determining whether the prescribed minimum "wage" under the Wage Order was being paid, unless such meals were within the exception provided in the Regulations of the Administrator, i.e., unless such meals were not "board," but instead were "facilities which are primarily for the benefit or convenience of" respondent. The District Court found that they were of the latter character. On this point like-

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See petitioner's own statement (R. 253): " * * the furnishing of meals * * * by Respondent was notorious, uniform and consistent throughout the entire railroad industry. It was certainly known among all dining-car managements and workers. *It was part of the price these managements were willing to pay to insure the desired service.*" (Emphasis supplied.)

wise the Adjustment Board had made no finding at all. The Circuit Court held (R. 291) that this finding was not supported by the evidence, i.e., the petitioner had not sustained its burden of proof. This holding is clearly within the scope of the appellate inquiry, and not a ground for certiorari. All the authorities are in accord, holding in identical circumstances that the reasonable cost of meals furnished by employers to employees pursuant to agreement, express or implied, may be included in determining whether the minimum wage under the Fair Labor Standards Act or the wage orders issued thereunder has been paid. *Shelton v. Missouri-Kansas, etc. R.R. Co.* (U.S.D.C. E.D. Mo.), 3 C.C.H. Labor Cases 60036 (R. 168); *Brotherhood, etc. v. Nashville & St. L. Ry.*, 56 F. Supp. 559; *Joint Council Dining-Car Employees v. Chicago, Milwaukee, St. P. & P. R. Co.*, Award No. 2699, Third Division, National Railroad Adjustment Board (copy attached as Appendix A); compare also, *Harris v. Lambros*, 56 F.(2d) 488; *Anderson v. Mt. Clemens Pottery Co.*, 69 F. Supp. 710; *California Employment Commission v. Black-Foxe Military Institute*, 43 Cal. App. (2d) Supp. 868; *Pacific American Fisheries, Inc. v. United States* (C.C.A. 9), 138 F. 2d 464.

ARGUMENT

I.

The Reasons Assigned by Petitioner for Granting Certiorari (Brief, pp. 19-22) Assume a Situation Which Does Not Exist on the Record of This Case.

Each of the reasons assigned by petitioner for granting certiorari is based on the same general ground, i.e., that the Circuit Court failed to give to the findings and order

of a Division of the National Railroad Adjustment Board the weight to which they are entitled. Section 3, First (p) of the Railway Labor Act (45 U.S.C.A., Sec. 153, First (p)), provides that in the trial of a suit to enforce the findings and order of a Division of the Railroad Adjustment Board:

> "* * * the findings and order of the division of the Adjustment Board shall be prima facie evidence of *the facts therein stated* * * *" (emphasis supplied).

Under this provision, petitioner's position would be well taken *only* as to *facts* stated in the order and findings of the Division (and supported by the evidence before the Division) to which the Circuit Court failed to give prima facie evidentiary weight. That, and no more, is the scope of the principle of the cases cited by petitioner at pages 19 and 20 of its brief.

As shown above in our Statement of the Case, the Division decided only one of the two questions presented to it and expressly avoided the question which the Circuit Court ultimately decided.* The Award here in suit provided that the claim was sustained "to the extent indicated in the Opinion and Findings" (R. 24). The Opinion must therefore be examined to determine the intended scope of the Award and Order (*Munsey v. Virginian Ry. Co.*, 38 F. Supp. 881). The Opinion shows clearly that the Division intended to make no finding of fact on the question whether or not the carrier (respondent) could take into account the reasonable cost of furnishing the meals in determining whether the applicable minimum wage was being paid.

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*But see the Division's Award 2699 (Appendix A) in which this question was squarely decided *against* petitioner's contention.

The only question decided by the Division in the Award in suit, and the only question on which it made any *findings of fact,* was whether the carrier was under a contractual obligation to furnish meals in addition to the money compensation provided for in the applicable agreement. There is no issue on this point, respondent having accepted the Division's finding.

The question litigated in both the District and Circuit Courts was the question upon which the Division in this Award made no findings. Upon that question, therefore, the provisions of Section 3, First (p), of the Railway Labor Act are inapplicable because there are no *"facts therein stated."*

In this behalf, the Circuit Court said (R. 289):

> "The case thus came to the district court without any findings on the sole contention there presented, i.e., Was the cost of the meals so contracted to be furnished not to be added to the cash wage in determining the minimum wage? That is to say, no question here exists concerning prima facie value of any finding of the Division under 45 U.S.C.A. 153 (p), providing that 'the findings and order of the division * * * shall be prima facie evidence of the facts therein stated.' "

Petitioner attempts to get around the situation which the Circuit Court so pointed out by arguing (Brief, pp. 27-32) that the words "claim sustained" must be construed to carry with them a finding of each and every *fact* necessary to support the claim. Thus it argues (Brief, p. 30) that these words have the same force and effect as a jury verdict. This argument is wholly specious. First, it ignores the fact, pointed out above, that the claim was

expressly sustained only "to the extent indicated in the Opinion and Findings" (R. 24); and that in the Opinion it was pointedly stated that the Division was refraining from making any findings on the question involved in this case. Second, if petitioner's contention were correct, the statutory provision that "the findings and order of the division * * * shall be prima facie evidence of the *facts therein stated* * * *" would cease to have any meaning. Petitioner's contention on this point is without any support, all of the authorities being to the contrary. See *System Federation No. 59, etc. v. Louisiana & A. Ry. Co.* (C.C.A. 5), 119 F.2d 509 (cert. denied 314 U.S. 656) where it is stated (p. 513):

> "The act (Railway Labor Act) contemplates not merely general conclusions, but precise and definite findings of fact and final and definite awards, capable of enforcement, not vague general outlines which must be filled in by the courts."

Compare also *Railroad Yardmasters of North America v. Indiana Harbor Belt R. Co.*, 70 F. Supp. 914, where it is stated (p. 916):

> "The order incorporates by reference the award and contains no added specifications. The award itself reads merely, 'Complaint disposed of per findings.' The findings recite, 'We find, as represented by petitioner, that the facts presented in this docket are contrary to the provisions of controlling Rule 7(a) of the Yardmasters' Agreement, and so hold.' This so-called finding is not a finding of facts; it is a conclusion of law. It is a conclusion based on facts that are not in the findings but apparently are in the 'docket,' whatever that may be. True, a statement of

claim precedes the findings but whether this statement is identical with the facts 'presented' in the docket is not revealed.

"Furthermore, the statement of claim itself is indefinite. It does not contain the names of the two yardmen over whom the dispute arose. Extraneous evidence would have to be adduced to give the award meaning.

"On this point, I think the following statement in System Federation No. 59 of Railway Employees Department of American Federation of Labor v. Louisiana & A. Ry. Co., 5 Cir., 119 F.2d 509, 513, applies: 'The act contemplates not merely general conclusions, but precise and definite findings of fact and final and definite awards, capable of enforcement, not vague general outlines which must be filled in by the courts.' The provision in the Act that the findings and order shall be prima facie evidence of the facts stated therein requires the findings to be a definite and complete statement of the ultimate facts and not a legal conclusion based upon undisclosed findings."

The following statement made in *Hanks v. Delaware & H. R. Corp.*, 63 F. Supp. 161, 163, is also appropriate:

"In approaching the question the Court has in mind the language of the statute, 45 U.S.C.A., Sec. 153(p), to the effect that the findings and order of the Board shall be prima facie evidence of the facts therein stated. This provision is of little help in this particular case. The Board in its findings found only that it had jurisdiction, and that the claim should be sustained. Detailed findings of fact were not made, and the sustaining of plaintiff's award is more a conclusion than a finding."

In the light of these authorities, there is no conflict between the decision of the Circuit Court in this case and those cited by petitioner. *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 327 U.S. 661 (Brief, p. 19), was not a suit to enforce an Adjustment Board Award, but involved rather the question of the authority of a collective bargaining representative to submit claims of individuals to the Adjustment Board, or to settle or compromise them with the carrier. This Court's language quoted by petitioner is to be read in the light of the question discussed, and particular note may be taken of the footnote reference (p. 664) to the statutory provision that the Board's award "shall be prima facie evidence of *the facts therein stated.*" (Emphasis supplied.)

Spiller v. A. T. & S. F. R. Co., 253 U.S. 117, upon which petitioner principally relies, decided only that the findings of the Interstate Commerce Commission would not be upset if the essential facts found were based upon substantial evidence before the Commission. That case is wholly distinct from the case at bar because in the *Spiller* case there were findings *of fact* by the Commission, to which the statutory rule could be applied. As this Court said (253 U.S. at p. 123):

> "The report contains appropriate findings adequate to support the award."

The same distinction exists between the present case and each of the others cited by petitioner in this connection (Brief, pp. 19-20). In each the Board or Commission whose order was sought to be enforced had made findings *of fact* which supported the order and the only question was whether these findings were in turn sup-

ported by substantial evidence. For example, in *Hernandez, Inc. v. Bernstein,* 116 Fed. 2d 849 (Petitioner's Brief, p. 20), the Court said (p. 850):

> "Thereafter hearings were held * * * resulting in *findings of fact* which supported the charges and on which an order was entered * * *." (Emphasis supplied.)

No useful purpose would be served by reviewing in detail the remaining cases cited. As stated, in each the same grounds of distinction are present. Each involved a statute providing, like Section 3, First (p), of the Railway Labor Act, that the findings and order of the board or commission should be prima facie evidence "of the facts therein stated," but each opinion shows that the facts were stated in the findings and order sought to be enforced. When, on the other hand, a fact without which petitioner cannot prevail is not stated by the Board, there is nothing to which the Court can give evidentiary weight under the statute. Such is the situation in the present case.

The remaining reason assigned by petitioner for the granting of certiorari (Brief, p. 21) has no basis in either law or logic. It is nothing but a thinly veiled threat to resort to self-help, i.e., a strike, unless this case is decided to its liking. Petitioner's position is that an Adjustment Board award favorable to the petitioning organization must be enforced, whether or not it is supported by the facts stated therein. This, of course, is not the law. As petitioner itself conceded elsewhere in its brief (p. 4), provisions identical with those in Section 3, First (p) of the Railway Labor Act have long been contained in other acts setting up administrative bodies, and their

force and effect is well settled by decisions. This case has been decided on the basis of the law, not because of threats; and no threat, no matter how thoroughly it might be carried out, should be permitted to disturb the well reasoned and legally correct determination of the Court below.

Petitioner, conceding *arguendo* that the essential finding is lacking, asserts that it has been "ambushed" (Brief, p. 32). The position in which petitioner finds itself is of its own making. Upon securing an award and order which failed to include any finding of fact on the pivotal question, petitioner had the alternative of either (1) requesting the Division to make a finding upon this question; i.e., "interpret the award" (Section 3, First (m), Railway Labor Act, 45 U.S.C.A. 153, First (m)), or, (2) endeavoring to enforce the award without such a finding, in which case it would not have the benefit of the prima facie evidence rule, because there were no "facts therein stated" on the pivotal question. Petitioner elected the second alternative for a very obvious reason. The award and order in this case were entered October 23, 1944. Twenty-eight days later (November 20, 1944), the *same* Division of the Adjustment Board entered its Award No. 2699 (copy attached as Appendix A), in which it made findings adverse to petitioner's contentions on the precise questions which it had expressly refrained from deciding in the award and order involved here. Petitioner therefore preferred to proceed with its suit, with the hope that even without the statutory presumption, it might be able to make its proof on the issue. Having elected to take this chance by suit rather than face almost certain denial of

its claim upon resubmission to the Division, petitioner can hardly be heard to claim that it has been "ambushed," or misled, or otherwise deprived of its full day in court.

II.

The Circuit Court Did Not Exceed the Permissible Scope of the Appellate Inquiry.

While petitioner places its principal reliance upon the ground discussed above, a secondary claim is made that the Circuit Court failed to give proper weight and effect to the findings of the District Court (Brief, p. 23, where it is stated that the Circuit Court "erred in by-passing the * * * findings of the * * * District Court * * *" and p. 24, where it is said that "a Circuit Court of Appeals should not disturb a finding of the *District Court* when it is based on evidence subject to conflicting inferences").

In making this contention, petitioner has not correctly taken into consideration the rule of appellate review in a case of this nature. Under the Rules of Civil Procedure, in a non-jury case like this, it is no longer the rule that the findings of the trial court are binding on the appellate court if supported by any evidence. Particularly is this true where there is no dispute as to the basic facts, but only as to the inferences, conclusions, and ultimate facts to be drawn therefrom. In a non-jury case, where the evidence before the trial court is primarily documentary, as here, there is no reason for any rule according finality to the trial court's findings, for the trial court is in no better position to judge the credibility of the witnesses and the weight to be given to the evidence than is the appellate court. *Aetna Life Ins. Co. v. Kepler* (C.C.A. 8), 116 F.2d 1, 4; *Carr v. Southern Pacific Company* (C.C.A. 9),

128 F.2d 764, 768; *Western Union Tel. Co. v. Bromberg* (C.C.A. 9), 143 F.2d 288, 290; *Smith v. Royal Ins. Co.* (C.C.A. 9), 125 F.2d 222, 224 (cert. denied 316 U.S. 695).

Furthermore, it is not correct, as petitioner contends, that the Circuit Court "bypassed" a finding of the District Court. The controlling question in this case is whether the meals supplied to the waiters are part of their over-all "compensation." On this question the District Court made no finding.*

The only finding made by the District Court was that such meals were furnished as a working condition (R. 264, 265). The Circuit Court held this finding to be erroneous (R. 289), which it was entitled to do under the proper scope of the appellate inquiry in a case of this nature. Petitioner devotes the major part of its brief (pp. 26-36) to laboring the point that this was error, completely ignoring the added statement of the Circuit Court (R. 289):

> "If it were (a working condition), it nevertheless is a part of the wage or price."

The Third Division found, however, in the Opinion accompanying the award here in suit (No. 2663) that the meals were furnished pursuant to contract; and in its later award (No. 2699, copy attached as Appendix A) construed this as a finding that the meals were a part of the compensation of the employee entitled to them (R. 293). And compare petitioner's own statement in the proceedings before the Division (R. 253): " * * the furnishing of meals * * * by Respondent * * * was part of the price these managements were willing to pay to insure the desired service." As to this latter statement, petitioner now interestingly asserts (Brief, pp. 26-27) that in stating that the meals were "part of the price" it really meant that the meals were within "the law term 'consideration,' as used in contract law." If this be true, then the meals are all the more definitely established as part of the over-all compensation

Thus it at once appears that the finding of the District Court was not "bypassed," for the Circuit Court, while believing such finding erroneous, also viewed it as immaterial and considered that the result would be the same even if the finding were allowed to stand.

The District Court also found (R. 265) that the furnishing of meals by respondent to its dining-car waiters was "primarily for the benefit and convenience of respondent." This finding the Circuit Court on review of the record held not to be supported by the evidence (R. 291). Such holding is clearly within the scope of the appellate inquiry. Furthermore, it is in accord not only with all other court decisions on this same question, but also with the subsequent holding of the Third Division.* The following cases were cited by the Circuit Court:

Anderson v. Mt. Clemens Pottery Co., 69 F. Supp. 710 (R. 290);

Shelton v. Missouri-Kansas, etc. R. R. Co. (U.S.D.C. E.D.Mo.), 3 C.C.H. Labor Cases 60036, R. 168-176 (R. 297);

Brotherhood, etc. v. Nashville & St. L. Ry., 56 F. Supp. 559 (R. 296);

Pacific American Fisheries, Inc. v. United States, 138 F.2d 464 (R. 299).

In addition to these cases cited by the Circuit Court, its decision is also in accord with the decision in *Harris v. Lambros* (1932), 56 F.(2d) 488, where the question was whether the reasonable value of meals furnished to em-

*Award No. 2699 entitled: *Joint Council Dining Car Employees v. Chicago, Milwaukee, St. P. & Pacific R. Co.*, attached hereto as Appendix A, cited by the Circuit Court (R. 293).

ployees in restaurants and cafeterias, as a matter of custom and practice, came within the definition of "wages," in the Longshoremen's and Harbor Worker's Compensation Act (33 U.S.C.A., Sec. 902(13)). This act defined "wages" as:

> "The money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including *the reasonable value of board,* rent, housing, *lodging or similar advantages received from the employer,* * * *" (Emphasis supplied.)

In holding that the meals were part of the "wages," the court said (p. 489):

> "The facts as shown in this case are, it is true, somewhat different from those in the cases we have used by way of illustration, for here it is agreed defendant's employees were paid on a straight weekly basis *without any express agreement* they would be furnished meals, but, though there was no express agreement, there was admittedly a custom which had all the force and effect of an agreement, * * *
>
> "The silence, therefore, of the employer in engaging his help, with relation to the right to be fed at his cost, does not, in our opinion, alter the situation. It is the fact which controls, and here we have a case in which *employees, by reason of the nature of their employment, are relieved of the burden of providing food for themselves,* and the money value of that *benefit* is fixed by stipulation so that we are not left to speculation as to it. For the period in which the policy was in operation, *defendant's employees received their money compensation and their board, and the two together embraced their wages as defined by the statute, and embraced likewise the 're-*

> *muneration' on which the premium was calculated within the meaning of the contract,* and the reason for this is plain and simple, since, as we have seen, the whole purpose of the act is to provide indemnity to an injured employee based upon the wage loss sustained by him as a result of the injury, and to an employee of this defendant *the loss in such case would not be his wages alone, but his wages and his food, since each was a benefit which he enjoyed while employed* and is deprived of when injured." (Emphasis supplied.)

See also *California Employment Commission v. Black-Foxe Military Institute,* 43 Cal. App.(2d) Supp. 868, which involved the construction of the term "wages," in the California Unemployment Insurance Act (Deering's General Laws, Act 8780(d)). During part of the period covered by this case the term "wages" was defined (Sec. 11) as "the amount of money received as compensation for services rendered including * * * the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer." During the other part of the period covered by this case "wages" was defined (Sec. 11) as "all remuneration payable for personal services, including * * * the cash value of all remuneration payable in any medium other than cash."

The employer was an educational institution which required certain of its employees, for reasons of supervision and discipline of the cadets, to eat meals and lodge with them, such meals and lodging being furnished by the employer. There was no express agreement that such meals and lodging were to be a part of the employees' compensation.

The sole question was whether the value of such meals and lodging was part of the employees' "wages," as defined in the California Unemployment Insurance Act.

After discussing the "benefit and convenience rule" of the income tax cases (here relied on by petitioner, Brief, pp. 33, 34) and cases involving construction of the workmen's compensation laws where meals, lodging, etc. were held to be part of the employee's wages, the court said (p. 875):

> "This suggests, and we think it is true, that the real question arising under the so-called 'convenience rule' is whether the board, lodging or other facility furnished to the employee is in fact a part of his compensation for services rendered. If it is, it must be included as a part of his wages, at least under the law now in question, no matter how greatly the employer may be convenienced by the acceptance of such board, lodging or other facility by the employee."

The court accordingly held that the value of the meals and lodging furnished the employees was a part of their "wages."

CONCLUSION

There being no conflict between the decision of the Circuit Court and any decision of this Court or of any Circuit Court, and the decision of the Circuit Court being in accord with all of the authorities on the ultimate question in this case, it is submitted that the petition for a writ of certiorari should be denied.

Dated at San Francisco, February 2, 1948.

Respectfully submitted,

BURTON MASON,
Attorney for Respondent.

A. G. GOODRICH,
E. L. VAN DELLEN,
Of Counsel.

(Appendix Follows)

APPENDIX A

Award No. 2699
Docket No. DC-2660

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Edward F. Carter, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL OF DINING CAR EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employes, Local No. 351, for and in behalf of H. B. Petrie, Waiter and other employes similarly situated for certain amounts deducted from their wages in violation of the agreed to past practice for more than twenty years and of Rule No. 4, of the current agreement. Further, that such payments be made retroactive to March 1, 1941, and in accordance with the provisions of this Agreement, Rule No. 4:

"Employes will be given a letter identifying them to be provided with meals in Dining Cars and sleeping accommodations."

OPINION OF BOARD: On July 1, 1936, the Carrier and the Organization here involved entered into a collective agreement governing working conditions of employes in the Dining Car Department. For many years prior to the execution of the foregoing Agreement the Carrier had paid uniform wages for each class of work performed

and had assigned uniform hours of service and terms of employment in accordance with prevailing customs for dining car employes in the railroad industry. In addition to the cash wages paid to its employes, the Carrier also furnished meals and sleeping accommodations at its own expense to dining car employes on duty or deadheading. We think the record shows that the furnishing of meals and sleeping accommodations to dining car employes prior to July 1, 1936, was a long established practice.

In the Agreement of July 1, 1936, the furnishing of meals and sleeping accommodations to dining car employes on duty was not mentioned. The Employes contend that the Carrier orally agreed to continue to provide them in accordance with the pre-existing practice. The Carrier denies that any such oral agreement was made. In any event, the Carrier did continue to provide meals and sleeping accommodations to these employes without charge for several years thereafter. There is no better yardstick in determining the intentions of parties to an agreement than the mutual interpretations which they themselves put upon it. It seems clear to us that the parties themselves intended, as demonstrated by their subsequent actions, that the furnishing of meals and sleeping accommodations to employes on duty or deadheading was a part of their pay in excess of the cash wages paid. It is just as much so as if the written agreement, after fixing the wage rate, had included the words "plus meals when on duty or deadheading." See Awards Nos. 2436 and 2663. Meals and lodging are not gifts or gratuities. If they were they could be taken away by the carrier at will. They must be, therefore, a part of the compensation of the employe entitled to them.

The Carrier contends, however, that the written agreement limited the furnishing of meals to employes deadheading in the interests of the Company as provided by Rule 4 of that agreement. We think this provision has the effect of extending the Carrier's obligation rather than limiting or abrogating the previously existing practice. Award No. 2663. The provision in the rule providing that "Employes will be given a letter identifying them to be provided with meals in dining cars and sleeping accommodations" is clearly for the purpose of readily identifying such employes and not intended as a limitation of the practice.

The Agreement of July 1, 1936, was amended effective January 1, 1938. No changes were made which would in any way affect the question at issue here. The Organization alleges that the Carrier orally agreed to continue the practice of providing meals to employes on duty or deadheading. The Carrier denies any such oral agreement. The Carrier did continue to furnish such meals until March 1, 1941. For the reasons previously recited, we think that the furnishing of meals continued to be a part of their pay in excess of the cash wages paid. This was the situation existing when the Fair Labor Standards Act of 1938, as modified by lawful processes under that Act, required the payment of a minimum wage of 30 cents per hour, effective October 24, 1939. At that time the Carrier began taking credit for meals and lodging furnished to the extent only of the difference between the negotiated rate of pay and the 30 cents per hour minimum established by the Fair Labor Standards Act. Effective March 1, 1941, the minimum wage rate under

the Fair Labor Standards Act was fixed at 36 cents per hour. The Carrier thereupon proceeded to take credit for meals and lodging furnished to the extent only of the difference between negotiated rate of pay and the rate of 36 cents per hour established by the Fair Labor Standards Act, or, if the meals and lodging furnished did not absorb the full amount, then only the reasonable cost thereof was charged to the employe. The reasonable cost has been determined to be the actual cost. No issue is raised here as to the correctness of the amounts deducted. The contention here is that no amounts should be deducted at all.

The basis for the foregoing method of calculating the pay of employes whose negotiated rate is less than the minimum required by the Fair Labor Standards Act, is a provision within that Act providing:

> "'Wage' paid to any employes includes a reasonable cost, as determined by the Administrator, to the employer of furnishing such employe with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employes. The term 'reasonable cost' is to be not more than the actual cost to the employer of the board, lodging or other facilities."

In Award No. 1727 this Board decided that the Carrier violated the agreement in charging the cost of meals against the difference between the negotiated rate and the minimum required by the Fair Labor Standards Act. That Award seems to have been followed in Award No. 2098. However, the Carrier in Award No. 1727 declined to put the Award into effect. In a suit to enforce the

Award in the District Court of the United States, that court held that where the carrier is obligated to furnish board to employes, and that said board was customarily furnished as part of the basic wage before the passage of the Fair Labor Standards Act, as well as thereafter, the carrier is entitled to claim an allowance for the reasonable cost of furnishing such board to employes, and the court declined to enforce the Award. Brotherhood of Maintenance of Way Employes, etc., et al., vs. The Nashville, Chattanooga & St. Louis Railway, No. 400-Civil, District Court of the United States, Middle District of Tennessee. We feel obliged to adhere to the foregoing court decision and to treat Award No. 1727 as having been disapproved by a higher tribunal having jurisdiction of the subject matter. Consequently, we are of the opinion that the Carrier had the right to charge for meals and lodging to the extent of the difference between the negotiated rate of pay and the minimum rate required by the Fair Labor Standards Act, up to the time, at least, when the wage increase effective December 1, 1941, became operative. In other words the deductions were legally made on August 31, 1941, a date that becomes important later in this opinion.

It must be borne in mind that the Fair Labor Standards Act did not affect collective agreements except in the cases of employes who received less pay than the minimum required by the Act and the regulation of maximum hours, a matter not here involved. Therefore, the negotiated Agreement of the parties is in effect except where it conflicts with the foregoing provisions of the Act.

On June 10, 1941, the Employes requested an increase

in wage rates in the amount of 30 cents per hour with a minimum hourly rate of 70 cents. This was refused by the Carrier and the services of the National Mediation Board were invoked. Mediation resulted in an agreement that employes would abide by the result of pending negotiations for wage increases by the fourteen non-operating organizations, and any increases granted would be made effective as of the date they became effective for the fourteen non-operating organizations. An increase of 10 cents per hour, with a minimum hourly wage of 46 cents, was granted the fourteen non-operating organizations effective December 1, 1941, and a 9 cents retroactive increase from September 1, 1941 to December 1, 1941. The wage agreement contained this provision:

> "From this minimum it is permissible to make deductions provided for by the Fair Labor Standards Act, for the reasonable cost of any board, lodging or other facilities furnished the employe, to the extent such deductions were being made as of August 31, 1941."

It is clear, therefore, that employes were entitled to a retroactive 9 cents per hour increase in pay from September 1, 1941 to December 1, 1941, and thereafter to an increase of 10 cents per hour, with a minimum hourly rate of 46 cents. And it is just as clear that the Carrier was entitled by the agreement to charge the actual cost of board and lodging to employes receiving less than the minimum rate on August 31, 1941 to the extent of the difference between the negotiated rate on August 31, 1941 and the minimum rate provided in the Fair Labor Standards Act at that time.

The Organization contends however that as it was not a party to the mediated wage agreement, effective December 1, 1941, that it is not bound by the section providing for legal deductions for meals and lodging. We think these agreed to deductions were just as much a part of the wage settlement as the hourly wage increases and the minimum hourly wage therein prescribed. It is clear to us that in granting the cash increases, it was contemplated by the parties that where the carrier was required to provide meals and lodging the actual cost thereof, not exceeding the amounts allowed on August 31, 1941, was to be considered as a part of the minimum wage required by the wage agreement. The Organization in agreeing to accept the increases granted to the fourteen non-operating organizations, is bound to take the whole agreement as it is, both the favorable and unfavorable portions thereof. In prescribing the minimum rate of 46 cents per hour, it was clearly contemplated that wages included not only cash but meals and lodging as well, and in determining whether the minimum rate provided by the wage agreement is being paid, the value of the money paid and the actual cost of meals and lodging, not exceeding the amounts deducted as of August 31, 1941, should be added together, the sum thus arrived at constituting the wages being paid within the purview of the wage agreement.

We have therefore arrived at the following conclusions: 1. Meals and lodging while on duty or deadheading in the interests of the carrier was a part of wages paid dining car employes prior to the agreement of July 1, 1936. 2. After July 1, 1936, such meals and lodging continued to be a part of the wages paid, the agreement

being silent with reference thereto and the parties continuing to mutually treat it as such. 3. That when the Fair Labor Standards Act became operative upon dining car employes of this character, as to employes affected by the Act, the carrier could properly deduct the actual cost of meals and lodging to the extent of the difference between the negotiated rate of pay and the minimum rate provided by the Act. 4. That when the "stand by agreement" of September 30, 1941 was entered into, the parties mutually agreed to accept the wage increases agreed upon by the fourteen non-operating organizations and carriers in mediation proceedings then pending. 5. That the agreement resulting from the foregoing mediation proceedings became binding upon the dining car employes herein involved, including the right of the carrier to deduct meals and lodging from the minimum rate therein provided to the same extent deductions were made as of August 31, 1941. 6. That as of August 31, 1941, deductions for meals and lodging were being made to the extent and not exceeding the difference in the negotiated rate under the collective agreement and the minimum provided in the Fair Labor Standards Act. 7. That under the wage agreement, effective December 1, 1941, under which these employes are bound by reference by the mediation agreement dated September 30, 1941, the carrier may, in accordance with the provisions thereof, deduct from the wages of those entitled to the minimum rate, the actual cost of meals and lodging but not exceeding the difference in the negotiated rate on August 31, 1941, and the minimum rate prescribed by the Fair Labor Standards Act on that same date.

The record indicates that the Carrier has been paying the claimant in accordance with the views herein expressed. Consequently, there has been no violation of the current agreement or of the mediated wage agreement effective December 1, 1941. No basis for an affirmative award exists.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That a violation of applicable agreements is not shown and no basis for an affirmative award exists.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 20th day of November, 1944.